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## Loss of Consortium Claims by Unmarried Cohabitants: The Roles of Private Self-Determination and Public Policy

As a result of the increased incidence<sup>1</sup> and social acceptance<sup>2</sup> of non-marital unions, courts throughout the country have been compelled to reexamine these relationships and their place in the law.<sup>3</sup> Many recent decisions have extended to unmarried cohabitants certain legal rights and obligations previously thought to arise only as incidents of a marital relationship.<sup>4</sup> One right, traditionally associated with marriage, that unmarried cohabitants have begun to claim is the opportunity to seek damages for loss of consortium.<sup>5</sup>

Through the concept of consortium,<sup>6</sup> the common law recognizes that a husband and wife possess an interest in each other which is so valuable

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<sup>1</sup> U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, SERIES P-20, NO. 349, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1979 at 3 (1980); *Bulloch v. United States*, 487 F. Supp. 1078, 1080 (D.N.J. 1980); *Marvin v. Marvin*, 18 Cal. 3d 660, 665, 557 P.2d 106, 109, 134 Cal. Rptr. 815, 818 (1976), *rev'd on other grounds*, [1981] 7 FAM. L. REP. (BNA) 2661; M. GLENDON, STATE, LAW & FAMILY 78 (1977); Bruch, *Property Rights of DeFacto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101 (1976); Clayton & Voss, *Shacking Up: Cohabitation in the 1970s*, 39 J. MARR. & FAM. 273 (1977); Note, *The Fearful and Wonderful Ramifications of Marvin v. Marvin*, 10 MEMPHIS ST. L. REV. 61, 61 & n.3 (1979); Note, *Loss of Consortium and Unmarried Cohabitants: An Examination of Tong v. Jocson*, 14 U.S.F. L. REV. 133, 133 & n.2 (1979) [hereinafter cited as Note, *Loss of Consortium*].

<sup>2</sup> See *Bulloch v. United States*, 487 F. Supp. 1078, 1080 (D.N.J. 1980); Kozlowski v. Kozlowski, 80 N.J. 378, 385, 403 A.2d 902, 907 (1979) (quoting *Marvin v. Marvin*, 18 Cal. 3d 660, 683, 557 P.2d 106, 113, 134 Cal. Rptr. 815, 831 (1976)); McCullon v. McCullon, 96 Misc. 2d 962, 965, 410 N.Y.S.2d 226, 228 (Sup. Ct. 1978).

<sup>3</sup> *Bulloch v. United States*, 487 F. Supp. 1078, 1080 (D.N.J. 1980). The *Bulloch* court noted: "Recent years have seen a nationwide flurry of cases that have challenged the traditional common law conception of extra-marital relations. . . . Similarly, the common law conception of the marital relationship has not been immune to reexamination." *Id.* (citations omitted).

<sup>4</sup> See generally M. GLENDON, *supra* note 1, at 91-96; Clark, *The New Marriage*, 12 WILLIAMETTE L.J. 441, 449-51 (1976).

<sup>5</sup> *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J. 1980); *Tong v. Jocson*, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977).

<sup>6</sup> Consortium has been understood generally as the relational interests that exist between spouses. The scope of these interests has been defined in various ways. One court said: "The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more." *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 405, 525 P.2d 669, 684, 115 Cal. Rptr. 765, 780 (1974) (quoting *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 502, 239 N.E.2d 897, 899, 293 N.Y.S.2d 305, 308 (1968)). Another court tried to give specific meaning to the "more" by declaring other protected interests to include "the right to live together in the same house, to eat at the same table, and to participate together in the activities, duties, and responsibilities necessary to make a home." *Tribble v. Gregory*, 288 So. 2d 13, 16 (Miss. 1974). When consortium is thus defined in functional terms, a cohabitant is injured in the same way as a spouse. *Bulloch v. United States*, 487 F. Supp. 1078,

that an injury to one injures the other as well.<sup>7</sup> To protect this relational interest the common law provides the tort action for loss of consortium.<sup>8</sup> By this action the deprived<sup>9</sup> spouse can recover damages for a tortious<sup>10</sup> act that renders the impaired spouse unable to provide "services, society, and sexual intercourse."<sup>11</sup>

Until recently, a party was required to be legally married at the time of the injury in order to recover in a consortium action.<sup>12</sup> This traditional requirement has been challenged in two cases by couples who were

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1085 (1980). The *Bulloch* court stated: "It seems obvious that a member of a cohabiting couple can suffer identical damage to that suffered by a spouse when his or her mate is injured." *Id.*

<sup>7</sup> General Elec. Co. v. Bush, 88 Nev. 360, 367, 498 P.2d 366, 371 (1972). When consortium is involved, a defendant's negligence "is an example of a single tortious act which harms two people by virtue of their relationship." *Id.*

<sup>8</sup> *E.g.*, *Troue v. Marker*, 253 Ind. 284, 252 N.E.2d 800 (1969); *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 302 N.E.2d 555 (1973); *General Elec. Co. v. Bush*, 88 Nev. 360, 498 P.2d 366 (1972); see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 124, at 873-74 (4th ed. 1977). The protection provided by the common law has changed drastically through the years. The historical antecedent of the modern action for loss of consortium was an action for interference with the master-servant relationship, by which action the master sued to recover the value of the servant's lost services. Through recognition of a husband's proprietary interest in his wife's services, the action was next extended to include compensation for their loss. Modern courts have made two additional changes. First, they have rejected the language involving possessory rights in the services of another and have focused instead on the often intangible relational interests. Second, all jurisdictions that recognize claims for loss of consortium have followed the lead of *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir.), *cert. denied, sub nom. Argonne Co. v. Hitaffer*, 340 U.S. 852 (1950), and allow claims by wives as well as husbands. For summaries of the historical development of the loss of consortium action, see *Ekalo v. Constructive Serv. Corp. of Am.*, 46 N.J. 82, 85-86, 215 A.2d 1, 3-4 (1965); W. PROSSER, *supra*, § 124, at 873; Green, *Protection of the Family Under Tort Law*, 10 HASTINGS L.J. 237, 239-41 (1959), *reprinted in* L. GREEN, *THE LITIGATION PROCESS IN TORT LAW* 449, 451-53 (2d ed. 1977). For a listing of the states that have recognized or rejected loss of consortium claims for spouses, see Comment, *Extending Consortium Rights to Unmarried Cohabitants*, 129 U. PA. L. REV. 911, 917-18 nn.37-40 (1981). Since that list was compiled, Washington has recognized such claims in *Lundgren v. Whitney's, Inc.*, 94 Wash. 2d 91, 614 P.2d 1272 (1980).

<sup>9</sup> This note adopts the terminology of the RESTATEMENT (SECOND) OF TORTS § 693, Comment a (1977). The person who suffers the physical injury as a result of the defendant's tortious conduct is called the impaired party. The person who suffers from the impaired spouse's inability to provide the consortium interest is called the deprived party. *Id.*

<sup>10</sup> "[N]either a cohabitant nor a spouse should be compensated through a tort action for loss of consortium when the proximate cause of the loss is not the defendant's tortious conduct, but rather discord in the relationship or the personal preferences of the people involved." *Bulloch v. United States*, 487 F. Supp. 1078, 1088. "In order to subject a defendant to liability to a deprived spouse . . . , all of the elements of a tort action in the impaired spouse must exist . . . ." RESTATEMENT (SECOND) OF TORTS § 693(1) & Comment e (1977). The tortious conduct can be either negligent, reckless, or intentional. See *id.* Comment b.

<sup>11</sup> W. PROSSER, *supra* note 8, § 124, at 874.

<sup>12</sup> *Domany v. Otis Elevator Co.*, 369 F.2d 604, 609 (6th Cir. 1966) (without lawful relationship of marriage there can be no recovery for loss of consortium); *Chiesa v. Rowe*, 486 F. Supp. 236, 239 (W.D. Mich. 1980) (quoting 41 AM. JUR. 2d, *Husband & Wife* § 447 (1968)) (consortium "action is incident to the marriage relationship and cannot exist without it") (emphasis by court); *Angelet v. Shivar*, 602 S.W.2d 185, 186 (Ky. App. 1980) ("[A] claim for loss of consortium is directly dependent upon the marital relationship for its existence.");

cohabiting without fulfilling the state's civil requirements for marriage.<sup>13</sup> In 1977 the California Court of Appeal in *Tong v. Jocson*<sup>14</sup> followed the traditional rule and rejected a deprived cohabitant's claim for loss of consortium because he was not married to his impaired partner on the date of her injury.<sup>15</sup> In 1980 the federal district court for New Jersey reached the opposite result in *Bulloch v. United States*.<sup>16</sup> The district court, in a matter of first impression under New Jersey law,<sup>17</sup> decided that a deprived cohabitant should not be barred from seeking damages for a tortious act that interrupts an ongoing cohabitation relationship.<sup>18</sup> The court held that "proof of a legal marriage is not an essential element of a consortium claim."<sup>19</sup> This note proposes that the *Tong* decision is incorrect and that the *Bulloch* decision should be followed.

The first section of this note examines the argument that permitting loss of consortium claims by unmarried cohabitants will require recogni-

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Sawyer v. Bailey, 413 A.2d 165, 166 (Me. 1980) (cause of action for loss of consortium does not exist when injury occurred before marriage while couple was engaged to marry); RESTATEMENT (SECOND) OF TORTS § 693, Comment h (1977); see *Tong v. Jocson*, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977). *Contra*, *Bulloch v. United States*, 487 F. Supp. 1078, 1079 (D.N.J. 1980) ("[P]roof of a legal marriage is not an essential element of a consortium claim.").

<sup>13</sup> Two other groups of claimants have sought the right to assert this cause of action despite the absence of a legal marriage on the date of injury. One group comprises persons who, although not actually married on that date, were engaged to marry and subsequently did marry. These claims in general have been rejected. *Chiesa v. Rowe*, 486 F. Supp. 236 (W.D. Mich. 1980); *Sawyer v. Bailey*, 413 A.2d 165 (Me. 1980). *But see Sutherland v. Auch Inter-Borough Transit Co.*, 366 F. Supp. 127 (E.D. Pa. 1973). The courts' theories for refusing to allow these claims were that, because the impaired and deprived parties were not married on the date of the impairment, the deprived party had suffered no injury, *Sawyer v. Bailey*, 413 A.2d at 167, and, even if the deprived party were injured, he waived any claim he might have had to his partner's ability to provide more or better consortium interests by marrying that partner with knowledge of the impairment, *Chiesa v. Rowe*, 486 F. Supp. at 238. The sole exception to these holdings is *Sutherland v. Auch Inter-Borough Transit Co.*, which allowed the claim because the couple was engaged to be married on the date of the injury and did in fact marry less than one month after the impairment, 366 F. Supp. at 134. The court did, however, limit the deprived plaintiff's damages to include only the period following the marriage; damages for the period between the impairment and the marriage were not allowed. *Id. Cf. Wagner v. International Harvester*, 455 F. Supp. 168, 169 (D. Minn. 1978) (general rule making loss of consortium claims dependent on existence of marriage may yield to special circumstances as in *Sutherland*; there are no such circumstances here).

The other group of claimants who have challenged this rule comprises persons who had no formal plans for marriage or had not even met on the date of the injury. These claims have also been rejected. *Wagner v. International Harvester*, 455 F. Supp. 168 (D. Minn. 1978); *Tremblay v. Carter*, 390 So. 2d 816 (Fla. Dist. Ct. App. 1980); *Angelet v. Shivar*, 602 S.W.2d 185 (Ky. App. 1980) (general rule making loss of consortium claims dependent on existence of marriage may yield to special circumstances as in *Sutherland*; there are no such circumstances here).

<sup>14</sup> 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977).

<sup>15</sup> *Id.* at 605, 142 Cal. Rptr. at 728.

<sup>16</sup> 487 F. Supp. 1078 (D.N.J. 1980).

<sup>17</sup> For a discussion by the *Bulloch* court of the role of federal courts in answering novel questions of state law, see *id.* at 1082.

<sup>18</sup> *Id.* at 1087.

<sup>19</sup> *Id.* at 1079.

tion of similar actions by a host of more remotely related claimants, thus unreasonably extending a tortfeasor's potential liability. The second section discusses the concern that recognizing the cohabitant's claim will defeat the state's interest in promoting marriage. The third and fourth sections, respectively, consider whether recognizing the cohabitant's claim will violate public policy by resurrecting common law marriage or by awarding speculative damages.

RECOGNIZING LOSS OF CONSORTIUM CLAIMS BY UNMARRIED  
COHABITANTS WILL NOT REQUIRE RECOGNITION OF  
MORE REMOTE CLAIMS

Modern tort law expresses two conflicting policies: the desire to compensate the innocent victims of another person's negligence<sup>20</sup> and the necessity of limiting a tortfeasor's responsibility for the effects of his act to less than all its consequences.<sup>21</sup> Limiting the scope of a tortfeasor's liability is necessary because "[e]very injury has ramifying consequences, like the ripples of the waters without end."<sup>22</sup> For this reason, "[t]he problem for the law is to limit the legal consequences of wrongs to a controllable degree."<sup>23</sup>

The court in *Tong v. Joeson*<sup>24</sup> invoked this policy of avoiding an uncontrollable extension of liability as the basis for refusing to recognize the unmarried cohabitant's cause of action.<sup>25</sup> The danger the court saw was apparently that if it were to recognize the cohabitant's claim, it would have no basis on which to deny similar claims by "brothers, sisters, cousins, in-laws, friends, colleagues, and other acquaintances who will be deprived of [the impaired party's] companionship."<sup>26</sup> The court in *Bulloch v. United*

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<sup>20</sup> See, e.g., *Bulloch v. United States*, 487 F. Supp. 1078, 1085 (D.N.J. 1980) (New Jersey adheres to policy of "expanding tort liability to justly compensate those who are injured."); *Dillon v. Legg*, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968) ("[W]e cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong."); *Ekalo v. Constructive Serv. Corp. of Am.*, 46 N.J. 82, 93, 215 A.2d 1, 7 (1965) (Pertinent policy voiced in recent decisions is one of "expanding tort liability in the just effort to afford decent compensatory measure to those injured by the wrongful conduct of others.").

<sup>21</sup> See, e.g., *Tong v. Joeson*, 76 Cal. App. 3d 603, 605, 142 Cal. Rptr. 726, 727 (1977) (quoting *Suter v. Leonard*, 45 Cal. App. 3d 744, 746, 120 Cal. Rptr. 110, 111 (1975)) (" '[N]ot every loss can be made compensable in money damages, and legal causation must terminate somewhere.' "); *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 446, 563 P.2d 858, 861, 138 Cal. Rptr. 302, 305 (1977) ("[S]ocial policy must at some point intervene to delimit liability."); *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969).

<sup>22</sup> *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969).

<sup>23</sup> *Id.*

<sup>24</sup> 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977).

<sup>25</sup> *Id.* at 605, 142 Cal. Rptr. at 727.

<sup>26</sup> *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 446, 563 P.2d 858, 862, 138 Cal. Rptr. 302, 306 (1977). The *Tong* opinion is very brief and consists almost entirely of quotations from prior cases. For this reason one must refer to those cases for much of the reasoning behind the *Tong* decision.

*States*<sup>27</sup> rejected that premise, noting that consortium actions by more remote claimants need not be recognized because their relationships with the impaired party differ from the relationship between cohabitants or spouses.<sup>28</sup>

Three arguments, from the *Bulloch* opinion and elsewhere, provide possible rationales for distinguishing cohabitants' consortium claims from those by other potential claimants. Two of these arguments—those based on factual similarity between cohabitation and marriage and on foreseeability—are flawed and should be rejected. The third argument, however, which is based on the functional similarities between cohabitation and marriage, is valid.

*The Argument That Cohabitation is Factually Similar to Marriage*

One rationale offered to distinguish a cohabitant's claim from that of other potential claimants is that a cohabitant's claim is factually similar to that of a spouse.<sup>29</sup> Two characteristics common to marriage and cohabitation, but not found in the other relationships, support this rationale: the existence of sexual activity<sup>30</sup> and the presence of only a single partner to the relationship.<sup>31</sup>

One group of potential consortium plaintiffs that has received considerable judicial attention is that of minor children,<sup>32</sup> and the absence of a sexual interest has been used to differentiate a child's claim from one by a spouse.<sup>33</sup> In the course of refusing to recognize consortium claims by minor children, the Supreme Court of California in *Borer v. American Airlines, Inc.*<sup>34</sup> said that "the spousal action for loss of consortium rests in large part on the impairment or destruction of the sexual life of the couple . . . . No similar element of damage appears in a child's suit for

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<sup>27</sup> 487 F. Supp. 1078 (D.N.J. 1980).

<sup>28</sup> *Id.* at 1086.

<sup>29</sup> See Note, *Loss of Consortium*, *supra* note 1, at 143.

<sup>30</sup> See *id.*

<sup>31</sup> See *Bulloch v. United States*, 487 F. Supp. at 1086; Note, *Loss of Consortium*, *supra* note 1, at 144.

<sup>32</sup> *E.g.*, *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); *Hankins v. Derby*, 211 N.W.2d 581 (Iowa 1973); *Russell v. Salem Transp. Co.*, 61 N.J. 502, 295 A.2d 862 (1972); *DeAngelis v. Lutheran Medical Center*, 84 A.D.2d 17, 445 N.Y.S.2d 188 (1981). For many years courts unanimously rejected loss of consortium claims by minor children, see *Borer v. American Airlines, Inc.*, 19 Cal. 3d at 449 & n.2, 563 P.2d at 864 & n.2, 138 Cal. Rptr. at 308 & n.2; Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 596 & n.22 (1976). Recently, two states have chosen to recognize such claims. The first was Massachusetts in *Ferriter v. Daniel O'Connell's Sons, Inc.*, \_\_\_ Mass. \_\_\_, 413 N.E.2d 690 (1980). Michigan followed with *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981).

<sup>33</sup> *E.g.*, *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 448, 563 P.2d 858, 863, 138 Cal. Rptr. 302, 307 (1977).

<sup>34</sup> 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

loss of consortium."<sup>35</sup> Because cohabitants alone among potential consortium claimants can experience this kind of loss, one is tempted to seize upon that fact as the limiting rationale needed to recognize the cohabitant's claim. Such reliance would be improper, however, for two reasons.

First, the *Borer* court's emphasis on sexual impairment has been properly criticized as overstated.<sup>36</sup> Indeed, the very opinion the *Borer* court quoted for the proposition that the consortium actions rests in large part on sexual impairment stated that the deprived spouse "is entitled to enjoy the companionship and moral support that marriage provides no less than its sexual side."<sup>37</sup> Second, such emphasis on sexual loss ignores the fact that a plaintiff need not have lost all the consortium interests in order to bring a successful suit.<sup>38</sup> It is quite possible to recover damages for loss of consortium when sexual performance is unaffected by the tortfeasor's act.<sup>39</sup>

The second factual characteristic—the presence of a single spouse or cohabiting partner—has likewise been used to differentiate spousal and cohabitants' consortium claims from those by minor children.<sup>40</sup> The concern at the heart of this distinction is the "substantial accretion of liability against the tortfeasor"<sup>41</sup> that would arise by "adding as many companion claims as the injured parent had minor children."<sup>42</sup> The *Bulloch* court, for example, allowed the cohabitant's claim on the ground that any accretion of liability that results from recognizing his claim will be less than that which would result from recognizing childrens' claims.<sup>43</sup>

Even though the presence of a single cohabiting partner provides a means to distinguish cohabitants from other potential claimants, courts should avoid attributing undue significance to this characteristic. While it may be useful in limiting the tortfeasor's liability, this characteristic

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<sup>35</sup> *Id.* at 448, 563 P.2d at 863, 138 Cal. Rptr. at 307 (quoting *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 405, 515 P.2d 669, 684, 115 Cal. Rptr. 765, 780 (1974)).

<sup>36</sup> See 19 Cal. 3d at 455, 563 P.2d at 868, 138 Cal. Rptr. at 312 (Mosk, J., dissenting) (*Rodriguez* "reasoned that the nonsexual loss suffered by a spouse is at least as great as the sexual loss.").

<sup>37</sup> *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 405-06, 525 P.2d 669, 684, 115 Cal. Rptr. 765, 780 (1974).

<sup>38</sup> *Bulloch v. United States*, 487 F. Supp. at 1087-88 (citing *Ekalo v. Constructive Serv. Corp. of Am.*, 46 N.J. 82, 90, 215 A.2d 1, 5 (1965)).

<sup>39</sup> See *Borer v. American Airlines, Inc.*, 19 Cal. 3d at 456, 563 P.2d at 868, 138 Cal. Rptr. at 312 (Mosk, J., dissenting).

<sup>40</sup> See, e.g., *Borer v. American Airlines, Inc.* 19 Cal. 3d at 449, 563 P.2d at 862, 138 Cal. Rptr. at 307; *Russell v. Salem Transp. Co.*, 61 N.J. 502, 506, 295 A.2d 862, 864 (1972).

<sup>41</sup> *Russell v. Salem Transp. Co.*, 61 N.J. 502, 506, 295 A.2d 862, 864 (1972), quoted in *Borer v. American Airlines, Inc.*, 19 Cal. 3d at 449, 563 P.2d at 863, 138 Cal. Rptr. at 309, and in *Bulloch v. United States*, 487 F. Supp. at 1086.

<sup>42</sup> *Russell v. Salem Transp. Co.*, 61 N.J. 502, 506, 295 A.2d 862, 864 (1972), quoted in *Borer v. American Airlines, Inc.*, 19 Cal. 3d at 449, 563 P.2d at 863, 138 Cal. Rptr. at 307, and in *Bulloch v. United States*, 487 F. Supp. at 1086.

<sup>43</sup> *Bulloch v. United States*, 487 F. Supp. at 1086.

provides no justification for subjecting the tortfeasor to even that one additional claim.

*The Argument That the Deprived Cohabitant's Loss is a Foreseeable Consequence of the Tortfeasor's Act*

A second rationale offered to distinguish cohabitants' consortium claims from those of other potential claimants is that only a deprived cohabitant's loss is a foreseeable consequence of the tortfeasor's act.<sup>44</sup> In a famous application of the foreseeability test in another context, the California Supreme Court in *Dillon v. Legg*<sup>45</sup> formulated three factors<sup>46</sup> to aid a court in determining whether a particular loss is foreseeable. One of these is "[w]hether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship."<sup>47</sup> The *Dillon* court used this factor to conclude that "[s]urely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma."<sup>48</sup> Building upon this approach in the context of a spousal consortium claim, the same court in *Rodriguez v. Bethlehem Steel Corp.*<sup>49</sup> concluded that "[b]y parity of reasoning . . . one who negligently causes a severely disabling injury to an adult may reasonably expect that the injured person is married and that his or her spouse will be adversely affected by that injury."<sup>50</sup> This reasoning has since been extended to justify recognizing consortium claims by unmarried cohabitants. Given the prevalence of and publicity about cohabitation, the argument goes, one who injures an adult may reasonably expect that the impaired party is cohabiting with another person and that the injury will adversely affect the deprived partner.<sup>51</sup>

This rationale is subject to two criticisms. First, the California Court of Appeal has ruled in *Drew v. Drake*<sup>52</sup> that one cohabiting partner is not closely related to the other for purposes of establishing foreseeability.<sup>53</sup>

<sup>44</sup> See Comment, *supra* note 8, at 934; Note, *Loss of Consortium, supra* note 1, at 145-46.

<sup>45</sup> 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

<sup>46</sup> *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. The court did not decide the effect the absence or reduced weight of any of these factors would have on foreseeability. *Id.* at 741, 441 P.2d at 920, 69 Cal. Rptr. at 80.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

<sup>49</sup> 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

<sup>50</sup> *Id.* at 399-400, 525 P.2d at 680, 115 Cal. Rptr. at 776.

<sup>51</sup> Comment, *supra* note 8, at 934-35; Note, *Loss of Consortium, supra* note 1, at 146; see *Drew v. Drake*, 110 Cal. App. 3d 555, 559, 168 Cal. Rptr. 65, 66 (1980) (Poché, J., dissenting).

<sup>52</sup> 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980).

<sup>53</sup> *Id.* at 558, 168 Cal. Rptr. at 66. This holding drew a scathing dissent, *id.* at 558-59, 168 Cal. Rptr. at 66-67 (Poché, J., dissenting), and as a categorical conclusion should be rejected. But for now this holding represents a rejection of foreseeability as a limiting rationale for a cohabitant's consortium claim.



A much more serious fault with the foreseeability test is that it does not exclude any of the other potential claimants. If it is foreseeable that a party will have a spouse or cohabiting partner who will suffer from his impairment, it must be equally foreseeable that other potential claimants will suffer similar losses.<sup>54</sup> Indeed, as a test of liability, foreseeability cannot be considered an *ex ante* decisional process, but rather is an *ex post* justification for a result that has already been reached by weighing the policy interests involved.<sup>55</sup> These policy interests are accounted for in the remaining rationale.

### *Cohabitation is Functionally Similar to Marriage*

The rationale with which courts should differentiate a cohabitant's loss of consortium claim from one by other potential claimants is that cohabitation alone is functionally like marriage.<sup>56</sup> This analysis looks to the in-

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The exact nature of the term "closely related" has been the subject of some dispute in the California courts. In *Mobaldi v. Regents of Univ. of Cal.*, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976), a case involving an action for negligent infliction of emotional distress brought by a foster parent who witnessed injury to the foster child, the California Court of Appeal, Second District, implied that closeness of a relationship should be measured in terms of "[t]he emotional attachments of the family relationship and not legal status." *Id.* at 582, 127 Cal. Rptr. at 726. Then the same court, First District, held in *Drew v. Drake*, a case involving an action for negligent infliction of emotional distress brought by a cohabitant who witnessed the death of her partner, that cohabitation did not qualify as a close relationship under the *Dillon* test of foreseeability. The court distinguished *Mobaldi* on the basis of the knowledge by the defendants in *Mobaldi* of the close relationship between the injured party and the plaintiff. The court stated: "Here, in contrast, there was no family relationship and there was no allegation that respondents knew or should have foreseen any other kind of relationship between appellant and the victim of the accident." *Id.* at 558, 168 Cal. Rptr. at 66.

<sup>54</sup> *Borer v. American Airlines, Inc.*, 19 Cal. 3d at 446, 563 P.2d at 862, 138 Cal. Rptr. at 306.

<sup>55</sup> See Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1021 (1928), reprinted in L. GREEN, *supra* note 8, at 160 ("When we say in a particular case that plaintiff had a right, defendant was under a duty, and the like, this but means that we have already passed judgment. We are merely using these terms to pronounce the judgment passed."); cf. *Bulloch v. United States*, 487 F. Supp. at 1084 (quoting *Ekalo v. Constructive Serv. Corp. of Am.*, 46 N.J. 82, 95, 215 A.2d 1, 8 (1965)) ("In the ultimate, the acceptance or rejection of [a] consortium claim must be rested on sound policy considerations and a proper balancing of the interests concerned."). Professor Green has argued:

Since liability as a matter of law is denied in so many negligence cases in which foreseeability would impose liability, the only reasonable conclusion is that it yields to more imperative factors. On the other hand, since there are so many cases in which liability is imposed when there is no foreseeability, other than is implied by a jury's verdict, it must be concluded that foreseeability is an equally undependable basis for limiting liability.

Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1423 (1961), reprinted in L. GREEN, *supra* note 8, at 305.

<sup>56</sup> See *Bulloch v. United States*, 487 F. Supp. at 1086 (Children's consortium claims have been rejected because "the relationship between parent and child is different in kind from the relationship between spouses. Of course there are no such differences in the present case, since Edith Bulloch alleges injuries identical to those suffered by a spouse.") (citation omitted). See also Comment, *supra* note 8, at 921.

terests that justify a spouse's consortium claim and concludes that these same interests can also be found in a cohabitation relationship.

The *Bullock* court followed this rationale because "New Jersey courts favor a realistic view of a plaintiff's situation over abstract legal principles."<sup>57</sup> The court recognized the functional similarities between cohabitation and marriage and concluded that "a person who, as a result of tortious conduct, loses services, aid, comfort and conjugal fellowship of the type typically shared by spouses is entitled to recover for loss of consortium."<sup>58</sup> This statement indicates that the court was concerned with protecting the interests arising from a special kind of relationship.

The special status of marriage in the law is clear. The Supreme Court has said, for example, that marriage is "'the foundation of the family and of society, without which there would be neither civilization nor progress'"<sup>59</sup> and that marriage is "'fundamental to the very existence and survival of the race.'"<sup>60</sup> Through marriage society accomplishes several important goals. Marriage allows the spouses to form a union to which each can look for emotional support;<sup>61</sup> it promotes a stable relationship upon which a stable society can be built;<sup>62</sup> and it provides a medium for the production and socialization of children.<sup>63</sup> A cohabitation relationship can likewise further these goals.

#### Cohabitants Can Look to Each Other for Emotional Support

Mutual emotional support arises from the bond established between the partners to a relationship. In the case of spouses, society looks to their fulfillment of the state's civil requirements for marriage as a con-

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<sup>57</sup> 487 F. Supp. at 1085.

<sup>58</sup> *Id.* at 1088 (emphasis added).

<sup>59</sup> *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

<sup>60</sup> *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). Despite such statements, it has been noted that the decisions pronounced by the Supreme Court actually display a large measure of ambivalence toward marriage. Clark, *supra* note 4, at 445.

<sup>61</sup> *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)) ("Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."); M. GLENDON, *supra* note 1, at 325 (Marriage, as a family unit, "is supposed to be a private place where satisfying personal relationships between husbands and wives . . . can flourish. It is supposed to be a refuge from the psychic assaults of society and the disappointments of the world of work."); Clark, *supra* note 4, at 442 ("[T]he most significant function of marriage today seems to be that it furnishes emotional satisfactions. For many people it is a refuge from the coldness and impersonality of contemporary existence.").

<sup>62</sup> W. GOODE, *THE FAMILY* 4 (1964) ("[T]he family is the fundamental *instrumental* foundation of the larger social structure, in that all other institutions depend on its contributions.") (emphasis in original).

<sup>63</sup> *Id.* at 5; R. MORONEY, *THE FAMILY & THE STATE* 15 (1976); Clark, *supra* note 4, at 443.

venient objective proxy for this bond. Cohabitants, by foregoing these requirements, possess no such proxy as a marriage certificate, and occasionally it is said that the absence of a formal marriage signals an absence of a serious emotional bond.<sup>64</sup> This presumption contains two errors. The first error is that a strong emotional bond is often consistent with the decision to cohabit. A couple may choose to cohabit rather than to marry for a variety of reasons that do not imply the absence of commitment. For example, the choice may be influenced by purely economic factors such as the possible loss of pension, welfare, or tax benefits that will result from marriage, or a lack of money to obtain a divorce from a prior spouse.<sup>65</sup> Additionally, the choice may result from a desire for a "trial period" prior to marriage or from a philosophic rejection of the idea that the state must be a party to their relationship.<sup>66</sup>

Second, fulfillment of the state's requirements is not the only possible proxy for emotional commitment. Courts can also look to such objective factors as duration of the cohabitants' relationship,<sup>67</sup> the presence of children, joint ownership of property and bank accounts, and general reputation in the community.<sup>68</sup> On the basis of such an objective analysis, a court can legitimately conclude that "some informal relationships are very stable and can provide . . . emotional, psychological, and physical security . . . ."<sup>69</sup>

### Cohabitation Can Serve as a Social Organizing Unit

Marriage imposes certain familial roles and responsibilities on spouses that are conducive to order not only between the spouses but also within the society as a whole.<sup>70</sup> By encouraging the individual to assume responsibilities such as producing and allocating economic goods, caring for the sick, and promoting pro-social behavior, marriage serves a mediating role linking the individual to the social order.<sup>71</sup> This mediating role requires stability, and marriage is valued as a social building block because it is seen as an enduring union. Cohabitation, on the other hand, is occasion-

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<sup>64</sup> See Note, *Loss of Consortium*, *supra* note 1, at 150. See generally *Marvin v. Marvin*, 18 Cal. 3d 660, 675 n.11, 557 P.2d 106, 117 n.11, 139 Cal. Rptr. 815, 826 n.11 (1976) ("Some couples may wish to avoid the permanent commitment that marriage implies . . .").

<sup>65</sup> M. GLENDON, *supra* note 1, at 80.

<sup>66</sup> See *Marvin v. Marvin*, 18 Cal. 3d 660, 675 n.11, 557 P.2d 106, 117 n.11, 139 Cal. Rptr. 815, 826 n.11 (1976); M. GLENDON, *supra* note 1, at 79 ("In this group the legal marriage bond is seen as an unacceptable infringement of individual liberty, or as incompatible with the dignity of mutual ethical commitment.").

<sup>67</sup> See *Bullock v. United States*, 487 F. Supp. at 1088.

<sup>68</sup> See Note, *Loss of Consortium*, *supra* note 1, at 154.

<sup>69</sup> M. GLENDON, *supra* note 1, at 92 (quoting *Torrance v. Torrance*, [1975] 1 FAM. L. REP. (BNA) 2456 (Minn. Dist. Ct.)). See also *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972).

<sup>70</sup> See W. GOODE, *supra* note 62, at 2.

<sup>71</sup> *Id.*

ally labeled an ephemeral relationship,<sup>72</sup> and thus unsuited to fulfill this social role. This judgment is based on the perception that because cohabitants need employ no formal procedures to terminate the relationship, their relationship is more likely to dissolve than a marriage.<sup>73</sup>

This contention contains two errors. First, it ignores the facts that free terminability may not be an important factor in a couple's choice to cohabit<sup>74</sup> and that cohabitation can be a stable relationship in its own right.<sup>75</sup> Second, in view of the high percentage of marriages that now end in divorce,<sup>76</sup> the judgment that marriage is the sole domestic arrangement suited for meeting the needs of society must be questioned. With the enactment of no-fault divorce statutes,<sup>77</sup> which utilize some variant of irretrievable breakdown of the marriage as the basis for divorce, some writers have concluded that a marriage is terminable on unilateral demand.<sup>78</sup> One commentator has gone so far as to say that "the concept of permanence has been eliminated from the legal definition of marriage."<sup>79</sup> Conversely, courts have made it increasingly difficult to terminate a cohabitation relationship.<sup>80</sup> For these reasons courts should recognize that a stable cohabitation relationship can adequately serve as a social building block.

#### Cohabitation Can Provide a Proper Environment for the Socialization of Children

At one time courts adhered to the rule that children should not be raised by persons living in a cohabitation relationship.<sup>81</sup> This belief was prompted

<sup>72</sup> See note 64 & accompanying text *supra*. See generally Clayton & Voss, *supra* note 1, at 273.

<sup>73</sup> See Note, *Loss of Consortium*, *supra* note 1, at 150-53.

<sup>74</sup> See note 66 & accompanying text *supra*.

<sup>75</sup> See text accompanying note 69 *supra*.

<sup>76</sup> See U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 80 (102d ed. 1981) (in 1979 for every 1,000 population there were 10.6 marriages and 5.4 divorces); M. GLENDON, *supra* note 1, at 297 n.1 (quoting American divorce statistics from [1974] DEMOGRAPHIC Y.B. OF THE U.N., Table 13).

<sup>77</sup> See generally Annot., 55 A.L.R. 3d 581 (1974).

<sup>78</sup> M. GLENDON, *supra* note 1, at 230 ("There is agreement among the observers that divorce in California and the other pure no-fault states is in fact available on unilateral demand."); Clark, *supra* note 4, at 444 ("In the last five years divorce has been further liberalized in over half of the states by the enactment of statutes authorizing the termination of marriage whenever the relationship has broken down. In practice this has come to mean that either spouse can obtain a divorce at will.").

<sup>79</sup> Clark, *supra* note 4, at 444.

<sup>80</sup> See M. GLENDON, *supra* note 1, at 1 ("The change [in contemporary domestic relations law] is characterized by progressive withdrawal of legal regulation of marriage formation, dissolution and the conduct of married life, on the one hand, and by increased regulation of the economic and child-related consequences of formal or informal cohabitation on the other.").

<sup>81</sup> See, e.g., *Jarrett v. Jarrett*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979) (conclusive presumption that parents' cohabitation adversely affects children), *cert. denied*, 449 U.S. 927 (1980).

by a judgment that cohabitation was immoral and thus threatened the child's development.<sup>82</sup> More recently, in cases involving custody disputes between formerly married parents, courts have refused to presume that cohabitation by the custodial parent is harmful to the child.<sup>83</sup> One court said that "many of us know emotionally stable adults of the opposite sex who 'live together,' yet with whom we would gladly entrust our children. . . ."<sup>84</sup> Another court forthrightly termed the fact of cohabitation by a parent immaterial absent some demonstrable adverse effect on the well-being of the child.<sup>85</sup>

Further support for the proposition that children can be properly socialized when raised by cohabiting parents is found in the Supreme Court's decision in *Stanley v. Illinois*.<sup>86</sup> In *Stanley* the Court held that upon the death of a mother a putative father, who had cohabited intermittently with the mother for eighteen years and had fathered her three children, was entitled to a hearing on his fitness as a parent before the state could assume guardianship over his children.<sup>87</sup> The Court stated that the law should "recognize those family relationships unlegitimized by a marriage ceremony. . . . [F]amilial bonds in such cases [are] often as warm, enduring, and important as those arising within a more formally organized family unit."<sup>88</sup> The socialization of children thus can be accomplished by a cohabitation relationship as well as by a marriage.

The ability of a cohabitation relationship to fulfill these societal goals of providing an environment conducive to emotional support, social stability, and socialization of children provides the proper rationale for courts to recognize a cohabitant's loss of consortium claim. This ability provides both a means for avoiding an uncontrollable extension of liability—for these goals cannot be accomplished by any of the other potential consortium claimants—and a persuasive argument that a cohabitant's consortium interests deserve legal protection.

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<sup>82</sup> A cohabiting parent's "disregard for existing standards of conduct instructs her children, by example, that they, too, may ignore [the relevant moral standards of this state] and could well encourage the children to engage in similar activity in the future." *Id.* at 346-47, 400 N.E.2d at 424 (citations omitted).

<sup>83</sup> "The majority approach has been to uphold visitation restrictions or custody changes where there has been some proof that the cohabitation has affected the child." *Gallo v. Gallo*, [1981] FAM. L. REP. (BNA) 2499 (Conn.) (restriction permitted as to one particular cohabiting woman; any other restriction improper as overly broad).

<sup>84</sup> *Hackley v. Hackley*, [1979] 6 FAM. L. REP. (BNA) 2022 (Fla. Dist. Ct. App.).

<sup>85</sup> *Fort v. Fort*, [1981] 7 FAM. L. REP. (BNA) 2750 (Mass. App.).

<sup>86</sup> 405 U.S. 645 (1972).

<sup>87</sup> *Id.* at 658.

<sup>88</sup> *Id.* at 651-52.

RECOGNIZING COHABITANTS' CONSORTIUM CLAIMS WILL NOT  
DEFEAT THE STATES INTEREST IN PROMOTING MARRIAGE

Because the court in *Tong v. Jocson*<sup>89</sup> decided its case solely on the basis of the policy of limiting a tortfeasor's liability to a controllable degree,<sup>90</sup> it avoided the issue of whether a court could deny a cohabitant's loss of consortium claim on the theory that recognition would impede the state's interest in promoting marriage. By overcoming the extension of liability objection, the *Bullock* court was forced to decide whether allowing individuals to determine privately the nature of their relationship would defeat that state interest.<sup>91</sup> The *Bullock* court recognized that "[t]he question becomes . . . whether the policy in favor of marriage . . . is strong enough to prevent a cohabitant from presenting a claim for loss of consortium where a spouse could."<sup>92</sup>

The state's interest in marriage is demonstrated by the traditional view of marriage as a species of contract among three parties—the husband, the wife, and the state.<sup>93</sup> The state involves itself in marriage because of the valuable social functions accomplished through marriage. Because the state has an interest in seeing that these functions continue to be accomplished, it has been argued that the courts should not contribute to the popularity of a relationship that might be chosen as a substitute for marriage.<sup>94</sup> There are two responses to this contention.

First, the cohabitant's consortium claim does not threaten the state's interest in promoting the continued vitality of marriage. Underlying the argument that consoriturum claims by unmarried cohabitants must be rejected to promote marriage is the idea that if such claims are recognized, couples who otherwise would have married will choose instead to cohabit. Courts from *Marvin v. Marvin*<sup>95</sup> to *Buloch v. United States* have rejected

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<sup>89</sup> 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977).

<sup>90</sup> *Id.* at 605, 142 Cal. Rptr. at 727.

<sup>91</sup> 487 F. Supp. at 1085.

<sup>92</sup> *Id.*

<sup>93</sup> See, e.g., *Fricke v. Fricke*, 257 Wis. 124, 126, 42 N.W.2d 500, 501 (1950). The *Fricke* court stated:

There are three parties to a marriage contract—the husband, the wife, and the state. The husband and wife are presumed to have, and the state unquestionably has an interest in the maintenance of the relation which for centuries has been recognized as a bulwark of our civilization. That unusual conditions have caused a marked increase in the divorce rate does not require us to change our attitude toward the marital relation and its obligation, nor should it encourage the growth of a tendency to treat it as a bargain made with as little concern and dignity as is given to ordinary contract . . . ."

*Id.*

<sup>94</sup> See *Hewitt v. Hewitt*, 77 Ill. 2d 49, 58, 394 N.E.2d 1204, 1207-08 (1979).

<sup>95</sup> 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976). The *Marvin* court stated:

the notion that increased rights for cohabitants will adversely affect marriage. The *Bulloch* court correctly concluded that its decision "does not mean that the marital relationship is devalued."<sup>96</sup> This conclusion is reinforced by the recognition that regardless of increased rights for cohabitants, considerations of tradition, family expectations, and religion will continue to cause the vast majority of couples to choose to marry.<sup>97</sup> As the *Bulloch* court said: "I doubt many decide to marry because they want to have a cause of action for loss of consortium. Deciding against a cause of action for cohabitants, therefore, is unlikely to encourage people to wed."<sup>98</sup>

Second, the trend in the law in recent years has been to take a neutral position toward marital status.<sup>99</sup> One step toward neutrality with regard to cohabitants was taken when states decriminalized sexual intercourse by unmarried adults.<sup>100</sup> Another step came from *Marvin* and similar cases,<sup>101</sup> in which the courts held that cohabitation is a lawful relationship.<sup>102</sup> Other steps have come as the law has begun to take a neutral stance toward marital status in other areas,<sup>103</sup> including child custody

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Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution. The joining of the man and the woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.

*Id.*

<sup>96</sup> 487 F. Supp. at 1085-86.

<sup>97</sup> See M. GLENDON, *supra* note 1, at 172.

<sup>98</sup> 487 F. Supp. at 1086.

<sup>99</sup> See *id.* at 1080; M. GLENDON, *supra* note 1, at 82-83.

<sup>100</sup> *E.g.*, *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977) (a state statute providing criminal sanction for fornication by unmarried adults was struck down as an inappropriate exercise of police power and an impermissible invasion of privacy); see *Glasgo v. Glasgo*, \_\_\_ Ind. App. \_\_\_, \_\_\_, 410 N.E.2d 1325, 1331 (1980) (Indiana's "most recent criminal code does not attempt to proscribe sexual conduct between consenting adults in private . . ."); *Kozlowski v. Kozlowski*, 80 N.J. 378, 386, 403 A.2d 902, 907 (1979) ("[F]ornication is no longer designated as a crime [under New Jersey law]").

<sup>101</sup> *E.g.*, *Glasgo v. Glasgo*, \_\_\_ Ind. App. \_\_\_, 410 N.E.2d 1325 (1980); *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977); *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979); *Latham v. Latham*, 274 Or. 421, 547 P.2d 144 (1976).

<sup>102</sup> *E.g.* *Bulloch v. United States*, 487 F. Supp. at 1083. ("*Kozlowski*, then, is strong authority for the proposition that the relationship existing between the *Bullochs* is a lawful one . . .").

<sup>103</sup> The emerging concept of a constitutional right to privacy may require neutrality toward marital status. "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back as far as [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, . . . in the Fourth and Fifth Amendments, . . . in the penumbras of the Bill of Rights, . . . in the Ninth Amendment . . ." *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citations omitted). This right has long been recognized as particularly applicable to matters relating to decisions about one's family and marriage. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Judicial recognition of this privacy right is not restricted to persons in a legal marriage, however. The Supreme Court

disputes,<sup>104</sup> entitlement to governmental benefits,<sup>105</sup> availability of credit,<sup>106</sup> and housing opportunities.<sup>107</sup>

These considerations do not compel recognition for an unmarried cohabitant's loss or consortium claim,<sup>108</sup> but they do indicate a general attitude that should guide a court confronted with such an action. This attitude is that "the purpose of tort law is to compensate the people whose injuries are proximately caused by tortious conduct and that concepts of reward or punishment related to a person's marital state are irrelevant to a consideration of who is entitled to compensation."<sup>109</sup>

#### RECOGNIZING A COHABITANT'S CONSORTIUM CLAIM WILL NOT RESURRECT COMMON LAW MARRIAGE

A charge made in the past when courts were asked to recognize property claims between cohabitants,<sup>110</sup> and which because of the *Bullock* decision is likely to resurface in connection with cohabitants' loss of consortium claims, is that the recognition of such claims will resurrect common law marriage. This result would be contrary to public policy because a large majority of states have abolished common law marriage.<sup>111</sup> Critical differences between relationships negate this charge, however.

According to traditional doctrine, a couple could not create a common

has recognized a privacy right in unmarried persons. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (access to contraceptives must be same for unmarried and married persons); *Roe v. Wade*, 410 U.S. 113 (1973) (unmarried woman's right to abortion). Although the Supreme Court has not equated privacy with autonomy, see *Wilkinson & White, Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 590 (1977), and no court has recognized a right to cohabit with which the state may not interfere, "the outer limits of [the right of personal privacy] have not been marked." *Zablocki v. Redhail*, 434 U.S. at 385 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977)).

<sup>104</sup> By its decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), "The Court said in effect that marriage has no legal significance for the claims of parents to their children's custody." Clark, *supra* note 4, at 447.

<sup>105</sup> See *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (benefits of food stamp program may not be limited to households of related individuals); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973) (welfare benefits only to traditional families denies equal protection to illegitimate children). Professor Clark said of these decisions that they "may be described as holding that marriage has no legal effect on the entitlement to state benefits." Clark, *supra* note 4, at 447.

<sup>106</sup> See Note, *Loss of Consortium*, *supra* note 1, at 139.

<sup>107</sup> See *id.*

<sup>108</sup> See *Bullock v. United States*, 487 F. Supp. at 1082 (leap in logic is not self-evident).

<sup>109</sup> *Id.* at 1084.

<sup>110</sup> See, e.g., *Marvin v. Marvin*, 18 Cal. 3d at 694 n.24, 557 P.2d at 122 n.24, 134 Cal. Rptr. at 831 n.24 (enforcement of express or implied contracts for support upon breakup of non-marital union does not resurrect common law marriage); *Glasgo v. Glasgo*, \_\_\_ Ind. App. \_\_\_, 410 N.E.2d 1325, 1330 (1980) (same); *Kozlowski v. Kozlowski*, 80 N.J. 378, 387, 403 A.2d 902, \_\_\_, (1980) (same). But see *Hewitt v. Hewitt*, 77 Ill. 2d 49, 63, 394 N.E.2d 1204, 1210 (1979) (common law marriage would be resurrected if property claims between cohabitants were to be recognized).

<sup>111</sup> Clark, *supra* note 4, at 449.



law marriage without expressing a present mutual intent to be married.<sup>112</sup> A cohabiting couple deliberately chooses not to be married<sup>113</sup> and thus lacks the intent needed for a common law marriage. This absence of intent, and therefore of a common law marriage, is not merely a matter of semantics. Rather it means that the problems that led to the abolition of common law marriage will not accompany a cohabitant's consortium claim.

Common law marriage is disfavored because it is "a fruitful source of perjury and fraud."<sup>114</sup> The possibility for perjury and fraud arises because upon fulfilling a few simple requirements<sup>115</sup> a common law spouse becomes a legal spouse for all purposes and acquires certain rights as a result of that status.<sup>116</sup> For example, a person asserting that he was a common law spouse of an intestate decedent can claim a share of the decedent's estate.<sup>117</sup> Because the only other party to the relationship is unavailable to affirm or deny this assertion, courts have little basis on which to resolve competing claims.

There are at least two reasons such problems will not resurface if a cohabitant's loss of consortium claim is recognized. First, a plaintiff may not recover for loss of consortium when the impaired partner dies.<sup>118</sup> In such instances the plaintiff must proceed under the wrongful death statutes.<sup>119</sup> This fact means that a court will always be able to question both cohabitants in a loss of consortium claim. Second, and more importantly, a court need not convert cohabitants into spouses in order to recognize their consortium claims.<sup>120</sup> Rather a court need only realize that in this one area a cohabitation relationship promotes certain important social goals and thus deserves protection similar to that given to spouses.<sup>121</sup>

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<sup>112</sup> See, e.g., *In re Estate of Fisher*, 176 N.W.2d 801, 805 (Iowa 1970).

<sup>113</sup> See Clayton & Voss, *supra* note 1, at 273.

<sup>114</sup> *In re Wagner's Estate*, 398 Pa. 531, 533, 159 A.2d 495, 497 (1960).

<sup>115</sup> "The elements and conditions necessary to establish the existence of a common-law marriage have been outlined by this court as: . . . intent and agreement in praesenti as to marriage on the part of both parties together with continuous cohabitation and public declaration that they are husband and wife . . ." *In re Estate of Fisher*, 176 N.W.2d 801, 805 (Iowa 1970).

<sup>116</sup> See M. GLENDON, *supra* note 1, at 91.

<sup>117</sup> See, e.g., *In re Estate of Fisher*, 176 N.W.2d 801 (Iowa 1970); *In re Wagner's Estate*, 398 Pa. 531, 159 A.2d 495 (1960).

<sup>118</sup> RESTATEMENT (SECOND) OF TORTS § 693, Comment f (1977).

<sup>119</sup> *Id.* Of course, this merely means that the surviving cohabitant will be subject to the same inequity as the deprived cohabitant in a loss of consortium action if "dependents" is read to exclude unmarried persons. Accordingly, where the surviving cohabitant can demonstrate a stable relationship that is functionally equivalent to marriage, he should come within the scope of his state's wrongful death statute. See Comment, *supra* note 8, at 931 & note 101 for jurisdictions that have extended benefits to dependent parties in non-marital unions.

<sup>120</sup> See generally *Marvin v. Marvin*, 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830 ("We need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract, or extend equitable remedies.").

<sup>121</sup> See notes 61-88 & accompanying text *supra*.

By its own terms a cohabitant's loss of consortium claim presents only one inherent opportunity for perjury and fraud: the possibility that the cohabitants will collusively agree to allege the presence of the consortium interests when in fact these interests do not exist. The tortfeasor is adequately protected from such collusion, however, because the objective evidence<sup>122</sup> to which a court will look for assurance that the consortium interest exists will not be present if the cohabitants have engaged in only a "fleeting escapade."<sup>123</sup>

#### A COHABITANT'S DAMAGE AWARD WILL NOT BE SPECULATIVE

A loss of consortium action is intended to compensate the deprived partner for the disruption of his right to the continued enjoyment of the consortium interests his partner can no longer provide.<sup>124</sup> The amount of compensation awarded in a successful action is computed on the anticipated duration of the impaired partner's inability to make normal contributions to the relationship.<sup>125</sup> Thus, if the deprived cohabitant receives such compensation and at some later time during the period covered by the award leaves the relationship, he will have been unjustly enriched.<sup>126</sup> Presumptions about the instability of cohabitation relationships have led some to question whether the likelihood of separation is so great for the cohabitants that any damages that might be awarded would necessarily be speculative.<sup>127</sup>

The problem with this analysis is that it is, once again, based on mistaken assumptions about the relative stability of cohabitation relationships and marriage.<sup>128</sup> Once it is recognized that cohabitation relationships can be more stable than one might have thought and that marriages can be less stable than one might have hoped, the deficiencies in the speculative damages objection become apparent. To the extent that the deprived cohabitant is a partner to a stable relationship, the objection is overinclusive; to the extent that the deprived spouse becomes a divorce statistic, it is underinclusive.<sup>129</sup> The *Bulloch* court correctly concluded that by looking at the circumstances of the cohabitants' relationship, a court could be assured that "a verdict would be no more speculative than in the case of man and wife. Indeed, many newly-married couples have un-

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<sup>122</sup> See text accompanying notes 67 & 68 *supra*.

<sup>123</sup> *Bulloch v. United States*, 487 F. Supp. at 1088.

<sup>124</sup> See notes 6, 11 & accompanying text *supra*.

<sup>125</sup> See *Sutherland v. Auch Inter-Borough Transit Co.*, 366 F. Supp. 127, 134 (E.D. Pa. 1973) (Because the injury was permanent, the deprived partner recovered "for loss of past and future consortium . . . computed on Mrs. Sutherland's 49 year life expectancy").

<sup>126</sup> See Note, *Loss of Consortium*, *supra* note 1, at 151.

<sup>127</sup> See, e.g., *id.*, at 150.

<sup>128</sup> See text accompanying notes 67-69 *supra*.

<sup>129</sup> See Comment, *supra* note 8, at 937.

doubtedly recovered for loss of consortium under circumstances where the factfinder had less information to base its decision upon."<sup>130</sup>

### CONCLUSION

One of the cardinal virtues of the common law is its ability to respond to social changes, to create new rules of law, or to alter old rules as required to protect legitimate expectations.<sup>131</sup> The traditional limitation of loss of consortium claims to only legally married persons is a rule in need of such change. However adequate the rule may have been in the past, the phenomenon of cohabitation means that the circumstances that produced it have changed. Without a corresponding change in the rule, some deserving consortium interests will continue to go unprotected. Against this claim for protection there are no persuasive reasons, either in terms of tort liability policies or policies relating to marriage, not to allow cohabitants to assert the action. Courts should follow the lead of *Bulloch v. United States* and redress losses of valid consortium interests whether they occur within a marriage or within a cohabitation relationship that is objectively determined to be the functional equivalent of marriage.

LLOYD T. WILSON, JR.

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<sup>130</sup> *Bulloch v. United States*, 487 F. Supp. at 1087; *accord*, Note, *Loss of Consortium*, *supra* note 1, at 151.

<sup>131</sup> For an extended discussion of the ability, and duty, of the common law to respond to social changes, see *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 394-98, 525 P.2d 669, 676-79, 115 Cal. Rptr. 765, 772-75 (1974).